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22 UNITED STATES DISTRICT COURT
23 NORTHERN DISTRICT OF CALIFORNIA
24 SAN JOSE DIVISION

25 IN RE: HIGH-TECH EMPLOYEE
26 ANTITRUST LITIGATION

27 THIS DOCUMENT RELATES TO:
28 ALL ACTIONS

Master Docket No. 11-CV-2509-LHK

**PLAINTIFFS' CONSOLIDATED REPLY
IN SUPPORT OF MOTION FOR CLASS
CERTIFICATION AND OPPOSITION TO
DEFENDANTS' MOTION TO STRIKE
THE REPORT OF DR. EDWARD E.
LEAMER**

Date: January 17, 2013
Time: 1:30 pm
Courtroom: 8, 4th Floor
Judge: Honorable Lucy H. Koh

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INTRODUCTION

Plaintiffs respectfully submit this consolidated reply memorandum in support of their Motion for Class Certification (“Mot.”) and in response to Defendants’ Motion to Strike the Report of Dr. Edward E. Leamer (“Mot. to Strike”). As set forth in Plaintiffs’ opening brief and below, Plaintiffs have more than satisfied their burden under Rule 23. Defendants’ expert Dr. Kevin Murphy criticizes Plaintiffs’ expert based on factually incorrect and unscientific assumptions. These misplaced objections do not provide a basis to ignore the opinions of Dr. Leamer, which are well grounded in the scientific method and econometrics. Plaintiffs’ motion should be granted and Defendants’ motion should be denied.

As explained in Part One, Defendants have conceded every requirement of Rule 23 except predominance, take no issue with the concept of an alternate Technical Employee Class (should the Court be persuaded that such a definition is more appropriate), and have conceded the predominance of every common legal and factual issue in this case, including Defendants’ violation of the law, except as to impact and possibly damages. Even if impact and damages issues in this case were fully individualized, and they are not, the overriding commonality of all other issues would justify certifying the Class. Defendants try to mislead the Court to believe that differences among Class members prevent certification. But one of the key disputes between the parties here—whether the agreements between and among Defendants were sufficient to suppress compensation at Defendant firms—is fundamentally a class-wide dispute fought out with class-wide evidence. *That* is a question for trial, not class certification.

Part Two lays out common evidence and analysis capable of showing that Defendants’ agreements broadly suppressed the compensation of the members of both classes.¹ Defendants assert that their violations of the antitrust laws could not have materially impacted their employees’ pay because compensation is determined solely by external forces of supply and demand and Defendants, collectively or individually, do not have “power”—the ability to affect prices—in any relevant labor market. But this misses Plaintiffs’ main economic points.

¹ The “All-Salaried Employee Class” (or, the “Class”) and the alternate “Technical Employee Class.” See Expert Report of Edward E. Leamer, Ph.D. (“Leamer”) ¶¶ 8-9.

1 According to Dr. Leamer: (1) the information suppressing effects of the agreements
2 fundamentally interfered with the “price discovery” process at each Defendant firm thereby
3 blocking the employees and firms from ever getting to the market price (Leamer ¶¶ 71-76; Reply
4 Expert Report of Edward E. Leamer, Ph.D. (“Leamer Reply”) ¶¶ 10-40); and (2) principles of
5 “internal equity” within firms often override or supersede simple external forces of supply and
6 demand such that a company like [REDACTED]
7 [REDACTED]
8 [REDACTED] regardless of the “market price” for any particular job or job category (Leamer ¶¶ 101-148;
9 Leamer Reply ¶¶ 41-109). In line with these economic principles, Plaintiffs have amassed
10 abundant class-wide evidence, including economic theory, internal Defendant documents, and
11 standard econometric analyses, capable of showing that Defendants’ unlawful conduct widely
12 impacted the pay of their employees.

13 Plaintiffs also address the affirmative arguments of Defendants and Dr. Murphy,
14 contained in both their Opposition to Plaintiffs’ Motion for Class Certification (“Opp.”) and their
15 Motion to Strike, that their agreements were unlikely to suppress compensation because
16 [REDACTED]. But this is a red
17 herring. Class-wide analysis shows: (1) it is mobility—the willingness and ability of workers to
18 leave for better prospects—and not so much movement from one firm to another that ultimately
19 matters for compensation, and it is employee mobility that the agreements disrupted (Leamer
20 Reply ¶¶ 23-25); and (2) firms’ expectation that employees will leave—which the agreements
21 systematically diminished—matters much more to compensation than the adding of new workers
22 (Leamer Reply ¶¶ 10-40). Furthermore, as demonstrated by Dr. [REDACTED]
23 [REDACTED]
24 [REDACTED]. Finally, this argument has no place at the class
25 certification stage, when the Court considers whether Plaintiffs have common evidence of an
26 effect on the class, not whether Defendants can respond to that evidence.

27 Part Three refutes Defendants’ view that the variation in employee compensation means
28 that the effect of the agreements would not have been felt company-wide. Dr. Leamer does not

1 opine that in the absence of the agreements all employees would have been paid more by exactly
2 the same amount, only that they would have been paid more. As Dr. Murphy admitted at his

3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]

10 [REDACTED]. Leamer ¶¶ 101-126; Leamer Reply ¶¶ 41-66.

11 Defendants also mischaracterize Dr. Leamer’s testimony. Dr. Leamer did not opine only
12 that “some percentage over 50% suffered wage suppression.” Opp. at 18. *See also* Mot. to Strike
13 at 1. His opinion is clear: Class-wide evidence is capable of showing that Defendants’
14 agreements suppressed the compensation of “all or nearly all” members of the Class. Leamer ¶¶
15 101-149; Leamer Reply ¶¶ 41-109; Harvey Decl., Ex. 12 (Leamer Dep. 27:16-27:18 (“Q: Is most
16 51 percent? A: No, if you want a number, I would say **95 percent**.”)) (emphasis added).

17 Defendants and their expert also ignore other voluminous documentary and testimonial evidence,
18 including: [REDACTED]

19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]

25 [REDACTED]. Finally, contrary to Defendants’ argument, there are no conflicts among class
26 members as a matter of both fact and law.

27 Part Four explains how Dr. Leamer’s conduct regressions provide yet another
28 confirmation of class-wide impact. Multivariate regression is a universally accepted method of

1 demonstrating the effect of unlawful conduct in both antitrust and wage suppression cases. While
2 Dr. Leamer's conduct regression, *standing alone*, may not be able to pinpoint a single person's
3 damages, the overall magnitude of the estimated effect can tell the Court something significant
4 about whether the impact of unlawful conduct was widely felt. Moreover, Dr. Leamer's finding
5 that the agreements led to suppressed compensation at each Defendant, combined with evidence
6 [REDACTED], is
7 indeed class-wide evidence that all members of both Classes had their compensation artificially
8 suppressed. Dr. Leamer has no more "assumed" common impact by performing this regression
9 than he did when he testified about a similar regression at trial in the *In re TFT-LCDs* case earlier
10 this year, testimony that the Court accepted as evidence of both impact and damages. Dr.
11 Leamer's regression also offers a workable—indeed "working"—model of damages. Dr.
12 Murphy's purported "sensitivity analyses" are nothing more than a tactic to add variables and
13 change the model until it produces predictably absurd results. Defendants' attempt to
14 "disaggregate" is both misleading—because Dr. Leamer disaggregated—and methodologically
15 unsound. Done correctly, as Dr. Leamer did, it reports undercompensation at each Defendant, for
16 every year of the conspiracy period. As shown below, none of Dr. Murphy's criticisms refute the
17 validity of Dr. Leamer's model, and at most, they go to the weight a jury should or could place on
18 the model at trial.

19 In Part Five, Plaintiffs distinguish Defendants' purported authorities.

20 Finally, in Part Six, Plaintiffs object to Dr. Murphy's report and the self-serving manager
21 declarations on which it relies. Dr. Murphy's report does not meet the standards for scientific
22 opinion laid out in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 591 (1993), and
23 Defendants have failed, over Plaintiffs' objections, to disclose the facts on which he relied for it
24 (secret interviews with their employees), so it should be excluded under Rule of Evidence 702
25 and Rule of Procedure 26.

26 Plaintiffs' motion should be granted and Defendants' motion to strike should be denied.
27
28

1 ARGUMENT

2 I. ONLY A NARROW QUESTION REMAINS

3 The question before the Court is substantially narrowed by Defendants' papers.
4 Defendants do not dispute that Plaintiffs satisfy all the prerequisites for a class action under
5 Rule 23(a): numerosity, commonality, typicality, and adequacy. Defendants also do not dispute
6 that whether their agreements constitute antitrust violations and the nature and scope of their
7 conspiracy are common questions. [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED].² Compare
12 Consolidated Amended Complaint (Dkt. No. 65) ¶¶ 56-107 with Mot. at 7-15. [REDACTED]
13 [REDACTED]
14 [REDACTED]. *Id.* In antitrust cases, proof of conspiracy is a common issue
15 which predominates over all other issues. *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons,*
16 *Inc.*, 502 F.3d 91, 108 (2d Cir. 2007) (reversing denial of class certification: "Even if the district
17 court concludes that the issue of injury-in-fact presents individual questions, however, it does not
18 necessarily follow that they predominate over common ones and that class action treatment is
19 therefore unwarranted"); *In re TFT-LCD (LCDs) Antitrust Litig.*, 267 F.R.D. 291, 310 (N.D. Cal.
20 2010) (citing *In re Dynamic Access Memory Antitrust Litig.*, No. 02-1486, 2006 U.S. Dist. LEXIS
21 39841, at *38 (N.D. Cal. June 5, 2006)). Defendants nowhere explain why or how the individual
22 issues they claim exist would predominate over all of the concededly common issues at trial.

23 Defendants only assert that Plaintiffs cannot show class-wide harm through common
24 evidence. However, Defendants argue the incorrect legal standard. Defendants contend that
25 "common evidence" and "class-wide harm" mean "individualized evidence of individualized

26
27 ² [REDACTED]
28 [REDACTED]

Mot. at 13-14; Part II.C, *infra*.

1 harm.” Variability or flexibility in setting wages is beside the point. Prices do not need to be
2 identical in order to be impacted by a common conspiracy; courts routinely certify class actions
3 where, as here, any individual negotiations—of which there is little evidence—were commonly
4 impacted by Defendants’ misconduct.³ Nor does variation in job titles or responsibilities defeat
5 predominance where, as here, plaintiffs challenge a uniform company policy or practice. *See*,
6 *e.g.*, *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 945 (9th Cir. 2009) (holding that
7 class certification in an employment misclassification case is appropriate where there is evidence
8 of “standardized corporate policies and procedures governing employees . . . ‘despite arguments
9 about ‘individualized’ differences in job responsibilities.’”) (citing *In re Wells Fargo Home*
10 *Mortg.*, No. 08-15355, 2009 U.S. App. LEXIS 14864, at *958 (9th Cir. July 7, 2009)); *Campbell*
11 *v. PricewaterhouseCoopers, LLP*, No. 06-2376, 2012 U.S. Dist. LEXIS 169957 (E.D. Cal. Nov.
12 28, 2012) (varied work descriptions and seniority levels described in employee declarations did
13 not defeat predominance in misclassification case because all class members were subject to same
14 uniform policy).

15 That some damages issues may be individualized likewise does not defeat class
16 certification. Regardless of individual damages issues “found in virtually every class action in
17 which damages are sought,” it is “more efficient” for issues regarding Defendants’ common
18 violation “to be resolved in a single proceeding than for it to be litigated separately in hundreds of
19 different trials” *Butler v. Sears*, Nos. 11-8029, 12-8030, 2012 U.S. App. LEXIS 23284, at
20 *10 (7th Cir. Nov. 13, 2012). In addition to efficiency, certification is also warranted here on the
21 basis of “efficacy,” because the “stakes in an individual case would be too small to justify the
22 expense of suing, in which event denial of class certification would preclude any relief.” *Id.* at
23 *6. This concern is particularly important in antitrust class actions such as this that “play an
24 important role in antitrust enforcement.” *LCDs*, 267 F.R.D. at 298-299 (citing *Reiter v. Sonotone*

25 ³ *See, e.g.*, *LCDs*, 267 F.R.D. at 604 (“neither a variety of prices nor negotiated prices is an
26 impediment to class certification if it appears that plaintiffs may be able to prove at trial that . . .
27 the price range was affected generally”) (quoting *In re NASDAQ Market-Makers Antitrust Litig.*,
28 169 F.R.D. 493, 523 (S.D.N.Y. 1996)); *In re Ready-Mixed Concrete Antitrust Litig.*, 261 F.R.D.
154, 171 (S.D. Ind. 2009) (finding that “individual negotiations” do not “prevent common proof”
and aggregating cases).

1 *Corp.*, 442 U.S. 330, 344 (1979)). Indeed, Defendants never seriously suggest that injury here is
2 individualized or suggest a rational way that individualized harm (to unknown employees who
3 did not receive offers of employment) could be proven. Defendants attack the *sufficiency* of
4 Plaintiffs’ evidence of class-wide harm, but they never offer that an individualized approach
5 would be better. The nature of this case means that if the agreements harmed class members they
6 did so on a widespread basis or not at all.

7 Defendants’ motion to strike does not change the Court’s inquiry or change Plaintiffs’
8 burden. *Daubert* asks the court to perform a gatekeeping function, ensuring that the jury is
9 presented with expert testimony that is scientifically and methodologically sound. Similarly,
10 under Rule 23, the court must consider whether plaintiffs have a plausible or workable
11 methodology to be used at trial for proving the case on a predominantly class-wide basis. *See*,
12 *e.g.*, *In re Titanium Dioxide Antitrust Litig.*, 284 F.R.D. 328, *32 (D. Md. 2012) (Court “must be
13 satisfied that the Plaintiffs have set forth a plausible methodology for proving class-wide impact
14 as a result of the alleged conspiracy.”). Defendants’ motion to strike and Plaintiffs’ motion for
15 class certification, therefore, both ask the Court the same question: whether the evidence at issue
16 is capable of being used for its purpose. It is.

17 **II. COMMON EVIDENCE IS CAPABLE OF SHOWING THAT THE**
18 **AGREEMENTS SUPPRESSED CLASS COMPENSATION**

19 The linchpin of Defendants’ briefs and expert report is the assertion that their violations of
20 the antitrust laws could not have widely impacted their employees because wages depend
21 exclusively on the forces of supply and demand and Defendants do not have “power”—the ability
22 to control prices—in any relevant market. Hence Defendants’ claim that Plaintiffs cannot show
23 that “the agreements had any impact whatsoever on the overall demand or supply for employees’
24 services” or that “Defendants could influence the demand for or supply of employee services in
25 those markets.” *Opp.* at 2, 6. While Defendants portray this as a silver bullet, it is really an
26 outdated and misleading view of economics—i.e., conspiracies cannot survive, and inevitably fail
27 to have any effect, because markets have perfect information—that has been disproven⁴ and is

28 ⁴ *See, e.g.*, Margaret C. Levenstein and Valerie Y. Suslow, *What Determines Cartel Success?*, 44
Footnote continued on next page

1 routinely rejected in antitrust conspiracy cases. According to Dr. Murphy’s “market equilibrium”
2 approach, if an employer reduces the salaries of its employees by a dollar below the “market
3 equilibrium” price, the result would be the en masse departure of all employees to other
4 employers who pay the “market” price. This extreme view has long been debunked by labor
5 economists as an accurate description of how labor markets actually work. Leamer ¶¶ 71-80;
6 Leamer Reply ¶¶ 34-40, 49.

7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED] The DOJ rejected it. See Declaration of Anne B.
13 Shaver (“Shaver Decl.”) (Dkt. No. 188), Ex. 72 (DOJ Competitive Impact Statement) at 10. The
14 DOJ and the California Attorney General rejected it again recently with respect to a similar
15 agreement between Intuit and eBay.⁵ Defendants trotted out the same argument in their motion to
16 dismiss: “a rational conspiracy would seek to eliminate . . . additional price pressures in order to
17 make the existing bilateral constraints effective.” Apr. 18, 2012 Order Granting in Part &
18 Denying in Part Defendants’ Jt. Mot. to Dism. at 20, Dkt. No. 119. The Court disagreed with
19 Defendants and agreed with the DOJ, finding that “even a single bilateral agreement would have
20 the ripple effect of depressing the mobility and compensation of employees of companies that are
21 not direct parties to the agreement,” and that “six parallel bilateral agreements render the
22 inference of an anticompetitive ripple effect that much more plausible.” *Id.* at 20-22. The
23 argument has no more force or substance in Dr. Murphy’s report. Plaintiffs have shown through
24

25 J. ECON. LIT. 43 (2006).

26 ⁵ Harvey Decl., Ex. 32 (Complaint at ¶ 3, *United States v. eBay, Inc.*, No. 12-5869 EJD (N.D.
27 Cal.)); *id.*, Ex. 33 (Complaint at ¶ 3, *California v. eBay, Inc.*, No. 12-5874 PSG (N.D. Cal.))
28 (“This agreement thus harmed employees by lowering the salaries and benefits they otherwise
would have commanded...”).

theory, documents, and statistical analysis that Defendants’ unlawful conduct would have widely impacted the pay of their employees.⁶

A. [REDACTED]

Dr. Leamer explained the standard and widely-accepted economic theory that real-world labor markets practically never operate at perfect equilibrium. Therefore, participants constantly “search” for the right price. Leamer ¶¶ 71-73; Leamer Reply ¶¶ 36-40. The availability—and lack—of information affects the speed at which that search resolves. *Id.* Dr. Leamer identified the Defendants’ employees as likely engaging in this “price discovery” process, given the features of employment at Defendants’ firms. Leamer ¶ 74; Leamer Reply ¶¶ 34-40. He tested for this process in action by demonstrating the premium received by Defendant employees who change jobs. Leamer ¶¶ 89-93.

In his report, Dr. Murphy claimed “neither the cited literature nor the broader economic literature provides support for [Dr. Leamer’s] claims,” and quibbled with Dr. Leamer’s reliance on a “paper” by Professor Joseph Stiglitz. Murphy at ¶ 67. That “paper” is Professor Stiglitz’s lecture delivered on his acceptance of the Nobel Prize for economics, Harvey Decl., Ex. 34, summarizing the field of information economics, which he helped pioneer. [REDACTED]

⁶ Indeed, as a matter of law where, as here, the agreements at issue are *per se* illegal, Plaintiffs need not plead or prove a relevant market or market power. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940). Defendants provide no argument or evidence to the contrary. Opp. at 5 n.1.

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]. Dr. Leamer provides additional explication of price discovery
5 theory in response to Dr. Murphy in his rebuttal report. Leamer Reply ¶¶ 28-40. [REDACTED]
6 [REDACTED]
7 [REDACTED]

8 **B.** [REDACTED]
9 [REDACTED]

10 Dr. Murphy and Defendants argue that the agreements did not [REDACTED]
11 [REDACTED]
12 [REDACTED] Murphy at pp. 15-22;

13 Opp. at 14-17; Mot. to Strike at 4-6. This argument has no theoretical or empirical support and
14 should be rejected as not scientific under *Daubert*. *Daubert* advised courts to look to the
15 scientific method when judging an expert's work: in particular, whether the expert has not only
16 offered an approach but tested it by performing experiments capable of showing it is not true.
17 509 U.S. at 593. A hypothesis that has been successfully tested becomes a theory. This is known
18 as "falsification" and it is fundamental to science. *Id.* (citing and quoting Karl. R. Popper,
19 CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE 37 (5th ed. 1989)
20 ("The criterion of the scientific status of a theory is its falsifiability, or refutability, or
21 testability")). See generally REFERENCE MANUAL ON SCIENTIFIC EVIDENCE (3d ed. 2011),
22 Federal Judicial Center, pp. 40-41 and n. 6 (discussing *Daubert*).

23 Dr. Leamer adheres to and applies the scientific method. He proposes a hypothesis of
24 how the agreements would have widely harmed class members, shows it to be solidly grounded in
25 economic theory, and then tests it in multiple ways. [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED] Had it not, his hypothesis
4 of class-wide impact would have been suspect. Dr. Leamer practices science.

5 [REDACTED]
6 [REDACTED]
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13 [REDACTED]
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17 [REDACTED]
18 [REDACTED]
19 [REDACTED]

20 Dr. Murphy therefore has no scientific basis for his affirmative opinions that the
21 agreements had no effect on worker wages, and no basis to describe Dr. Leamer's conclusions as

22 ⁷ As explained by authority cited by Dr. Leamer, an economist who relies on casual interviews to
23 support conclusions "moves beyond the boundary of economics itself into the realm of
24 anthropology and the territory of hermeneutics." Leamer Reply ¶ 27. Moreover, there are
25 standards for performing reliable qualitative research; Dr. Murphy did not follow them. *Id.* See
26 also, e.g., *Sapperstein v. Hager*, 188 F.3d 852, 856 (7th Cir. 1999) (trial court erred in relying on
27 an employee affidavit given its questionable credibility and finding that "[a]n employee of the
28 defendants is not a disinterested witness. She is subject to their influence, in a sense in their
power"); *In Wells Fargo Home Mortg. Overtime Pay Litig.*, 527 F. Supp. 2d 1053, 1060-61 (N.D.
Cal. 2007) (finding "glaring reliability concerns" with defendants' declarations from current
employees); *Kurihara v. Best Buy Co.*, No. 06-01884 MHP, 2007 U.S. Dist. LEXIS 64224, at
*29-30 (N.D. Cal. Aug. 30, 2007) ("[D]efendant's 'litigation-driven,' selective sampling of
employees and other data are insufficient to inject fatal uncertainty into the question of liability").

1 “implausible.” Murphy at p. 6. Dr. Murphy is attempting to weigh “facts” about the agreements
2 rather than apply economic theory to the data. Dr. Murphy’s opinions in this regard should be
3 excluded as not meeting the criteria for admissible expert testimony under *Daubert*. Even if they
4 were admissible, they are at most an (unpersuasive) disagreement with Dr. Leamer, not a basis for
5 rejecting Dr. Leamer’s opinions. Either way, Dr. Murphy’s report does not change the fact that
6 Dr. Leamer’s analysis offers common and reliable evidence that the agreements impacted workers
7 through the price discovery process. Defendants say they had no effect; but this is simply another
8 question of fact common to all class members.

9 C. [REDACTED]

10 The common impact of Defendants’ conspiracy is plain [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
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Footnote continued on next page

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[REDACTED]

D. Conduct Regression

Dr. Leamer’s statistical estimate of the harm to class-members—the “conduct” regression—is further evidence of the suppressive effect of the agreements. That regression shows the agreements had a substantial effect on all class members. [REDACTED]

[REDACTED] As discussed below, Defendants’

¹⁰ [REDACTED]

1 challenges to the regression go to its weight, not its admissibility or utility for meeting Plaintiffs'
2 burden at class certification. *See* Parts III.C and IV, *infra*.

3 **III. COMMON EVIDENCE SHOWS DEFENDANTS' AGREEMENTS SUPPRESSED** 4 **COMPENSATION**

5 Defendants misstate Plaintiffs' theory of impact and their task. Plaintiffs do not need or
6 intend to "identify who, in the absence of the agreements, would have received a cold call and
7 ultimately qualified for and received a new job at a higher salary" Opp. at 1. Rather,
8 Plaintiffs need only show that the suppression of wages would have been widely felt, which they
9 have done through economic theory, documentary evidence, and econometric analysis.
10 Defendants rely on the First Circuit case of *In re New Motor Vehicles Canadian Export Antitrust*
11 *Litig.*, 522 F.3d 6, 28 (1st Cir. 2008), for the proposition that Plaintiffs must prove injury to each
12 and every member of the Class. Opp'n at 11. *New Motor Vehicles* says no such thing.¹¹
13 Defendants ignore the voluminous authority in Plaintiffs' opening brief (Open. Br. at 15 & n.10
14 (collecting cases)), such as *Messner v. Northshore Univ. Healthsys.*, 669 F.3d 802, 818 (7th Cir.
15 2012) (vacating denial of class certification),¹² which have been followed in the Ninth Circuit.
16 *See, e.g., In re TFT-LCD Antitrust Litig.*, No. 07-1827 SI, MDL No. 1827, 2012 U.S. Dist.
17 LEXIS 9449, at *36-37 (N.D. Cal. Jan. 26, 2012) (denying motion to decertify class, citing
18 *Messner*); *Ellis v. Costco Wholesale Corp.*, No. 04-3341 EMC, 2012 U.S. Dist. LEXIS 137418, at
19 *39, 159 (N.D. Cal. Sept. 25, 2012) (certifying class, citing *Messner*). As *Messner* explains,
20 Defendants' approach "would come very close to requiring common proof of damages for class
21 members, which is not required. To put it another way, the district court asked not for a showing
22 of common questions, but for a showing of common answers to those questions. Rule 23(b)(3)
23 does not impose such a heavy burden." 669 F.3d at 819. Moreover, "it does not come with very
24 good grace for the wrongdoer to insist upon specific and certain proof of the injury which it has

25 ¹¹ The First Circuit did not require plaintiffs to "**show** that 'each member of the class was in fact
26 injured'" (Opp'n at 11), but rather to "**include some means of determining** that each member of
27 the class was in fact injured, even if the amount of each individual injury could be determined in a
28 separate proceeding. Predominance is not defeated by individual damages questions as long as
liability is still subject to common proof." *New Motor Vehicles*, 522 F.3d at 28 (emphasis added).

¹² In the opening brief, Plaintiffs inadvertently cited *Messner* as a Ninth Circuit case. It is not.

1 itself inflicted.” *In re TFT-LCD Antitrust Litig.*, 2012 U.S. Dist. LEXIS 9449 at *36 (quoting *J.*
2 *Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 566-67 (1981)).

3 A. [REDACTED]

4 In his opening report, Dr. Leamer explained the importance of the concept of internal
5 equity to companies like the Defendants. “Internal equity” refers to the common-sense fact that
6 people want to be paid fairly in comparison to their colleagues. Leamer, ¶¶ 101-106. A pay-raise
7 to one worker raises the expectations of similarly-situated colleagues, who may expect an
8 “equitable” increase, if not necessarily an “equal” one; this puts upward pressure on the pay
9 structure of the entire firm. Thus, had the agreements not been in place, cold-calls would have
10 transmitted information to, and put competitive pressure on, individual workers and groups of
11 workers at the Defendant firms, causing Defendants to [REDACTED]

12 [REDACTED] Dr. Leamer
13 further explains that the principle of internal equity as a force driving pay structures has been well
14 established as a matter of economic theory and actual practice. Leamer Reply ¶¶ 46-66.

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1 C. [REDACTED]

2 Dr. Leamer supplements the abundant theoretical, documentary and testimonial proof that
3 Defendants used pay structures to maintain internal equity with statistical analysis: (1) common
4 factors regressions showing that [REDACTED]
5 [REDACTED]; and (2) charts
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]. With respect to both his own work and Dr.
10 Leamer's, Dr. Murphy again ignores the scientific method and fails to grapple with the facts.

11 Dr. Leamer performs a series of regression analyses which test whether, and to what
12 extent, variation in Class member compensation is determined by common factors. Dr. Leamer's
13 point is that, if compensation is largely determined by factors that apply class-wide, then the
14 information-suppressing effects of Defendants' agreements would likely be experienced class-
15 wide. [REDACTED]

16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 Defendants criticize Dr. Leamer's common factors regression, arguing that the regression
23 results do not, by themselves, show that compensation levels moved together over time.
24 However, Dr. Leamer does not offer the common factors regressions as standalone evidence of
25 common impact. Rather, Dr. Leamer makes clear that, while the regressions support his opinion
26 that the agreements had widespread impact, they are to be considered in conjunction with the
27 [REDACTED]
28 [REDACTED]

1 [REDACTED]
2 [REDACTED] See, e.g., Leamer ¶ 131 (“[T]his [regression] evidence, *along with my other*
3 *analysis of the economics of Defendants’ compensation*, is capable of showing that the effects on
4 compensation from the Non-Compete Agreements would be expected to be broadly experienced
5 by all or nearly all [Class] members.”); Leamer Reply ¶¶ 41-68. All of that class-wide evidence,
6 taken together with Dr. Leamer’s opinion, is capable of proving widespread impact at trial.

7 [REDACTED]
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1 **E. Plaintiffs' Testimony is Further Class-Wide Evidence of Impact and Refutes**
2 **Dr. Murphy's Baseless Assumptions**

3 Defendants' argument that the experience of the named Plaintiffs is contrary to Plaintiffs'
4 theory of harm is incorrect. The named Plaintiffs all testified that a cold call from one of the
5 Defendants would be something to which they would respond, as opposed to computer-generated
6 mass emails that are based simply upon keyword searches of every resume on websites such as
7 Monster.com.¹⁶ The Plaintiffs did not testify that cold calls are categorically unreliable or not
8 helpful, or that they disregarded cold calling as a potential avenue for finding jobs.¹⁷ In fact, cold
9 calling provided valuable information about compensation.¹⁸ Moreover, some of the Plaintiffs
10 testified that they personally used such information to negotiate their compensation or to seek
11 new employment.¹⁹

12
13
14
15 ¹⁶ See, e.g., Harvey Decl., Ex. 11 (Stover Dep. at 131:4-13) ("I'm just talking about a company
16 that kind of stands out for me. So a firm like Adobe or Intuit, when you received, you know, a
17 form of somebody trying to recruit you for a position with those -- those firms, in comparison to
18 the kind of random recruiters' who approach you with positions at start ups[.]"); see also *id.*, Ex.
19 10 (Marshall Dep. at 27:17-28:15); *id.*, Ex. 8 (Fichtner Dep. at 103:15-104:10); *id.*, Ex. 7
20 (Devine Dep. at 150:22-151:6).

21 ¹⁷ See, e.g., *id.*, Ex. 10 (Marshall Dep. at 135:16-136:2) ("It seemed to be a primary way to find
22 out about job opportunities ... [to] make yourself available online so that recruiters can contact
23 you[.]"); *id.* at 282:17-20 (Marshall obtained his job at Semantic through a cold call); *id.*, Ex. 8
24 (Fichtner Dep. at 108:7-24) (cold calls "give[] me an idea of what the market is like," and
25 Fichtner passed that information on to co-workers); *id.*, Ex. 7 (Devine Dep. at 143:23-25) (cold
26 calls provided compensation information).

27 ¹⁸ See, e.g., *id.*, Ex. 10 (Marshall Dep. at 115:2-16) ("As I progressed through my career, I talked
28 to more and more recruiters, I've been told by [] those recruiters what they pay. I've gotten a
sense from them."); *id.*, Ex. 11 (Stover Dep. at 204:1-16) (receiving cold calls "provides some
motivation for, you know, being able to negotiate a higher salary."); *id.*, Ex. 7 (Devine Dep. at
47:25-49:1) (when considering a new job, compensation "should be appropriate for the market.").

29 ¹⁹ See, e.g., Marshall Dep. at 70:12-22; *id.* at 327:8-328:25 (Marshall let it be known that he had
interviewed elsewhere and was ready to leave Google, and received a raise to stay.); Fichtner Dep.
at 50:8-51:24 (When Fichtner learned that others in a similar role at a different company were
making more, he would raise it to his manager "to remind my manager [that] this is the market
value for somebody."); *id.* at 53:13-22 (Fichtner successfully negotiated a raise in equity
compensation at Intel based on market information); Hariharan Dep. at 80:10-81:9 (Hariharan
received a job offer for higher pay and asked his current employer to match it; when they
declined, he took the job offer).

1 **F. Class Members Did Not Benefit From Defendants' Misconduct, As A Matter**
2 **Of Both Fact And Law**

3 Defendants speculate that some unknown class members might not have been hired but
4 for Defendants' illegal agreements, and thus that such class members might have benefited in
5 some way from Defendants' misconduct. *See* Opp. at 22. Defendants never explain how this
6 "invalidates the class under both Rule 23(b)(3) and 23(a)(4)," Opp. at 22, or why Dr. Leamer
7 should be expected to quantify these hypothetical "benefits." These arguments have no merit.

8 First, the fact that some class members might have been hired from a non-Defendant
9 company because the agreements prevented the hiring of employees from Defendant companies
10 is legally irrelevant to the question of antitrust injury. Class members suffered antitrust injury the
11 moment they were paid less from a Defendant due to the anticompetitive agreements. *See*
12 *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 988 (9th Cir. 2000) ("When horizontal
13 price fixing causes buyers to pay more, or sellers to receive less, than the prices that would
14 prevail in a market free of the unlawful trade restraint, antitrust injury occurs."); *Doe v. Ariz.*
15 *Hosp. & Healthcare Ass'n*, No. 07-1292, 2009 U.S. Dist. LEXIS 42871, at *18 (D. Ariz. Mar. 19,
16 2009) ("Plaintiffs allege that they were injured when Defendants fixed the price of their wages
17 below a competitive rate. . . . this is an example of the type of injury the antitrust laws are meant
18 to protect against."). The measure of this injury is the full amount of underpayment. *Id.* at *22.
19 There is no "netting" defense. *See, e.g., Sports Racing Servs., Inc. v. Sports Car Club of Am.,*
20 *Inc.*, 131 F.3d 874, 885 (10th Cir. 1997) ("*Hanover Shoe* precludes the argument that [a plaintiff]
21 did not suffer cognizable antitrust injury merely because it passed overcharges on to its customers
22 or otherwise was shielded from competition by the defendants' anticompetitive behavior.");
23 *Meijer, Inc. v. Abbott Labs.*, 251 F.R.D. 431, 435 (N.D. Cal. 2008) ("*Meijer I*") (same); *Braintree*
24 *Labs., Inc. v. McKesson Corp.*, No. 11-80233 JSW, 2011 U.S. Dist. LEXIS 121499, at *4-5 (N.D.
25 Cal. Oct. 20, 2011) (same). Defendants cite no case to the contrary; nor do they cite a case
26 holding that a hypothetical ancillary benefit delivered to an unknown class member suffices to
27 defeat class certification.
28

1 Second, this purported “conflict” does not undermine a finding of adequacy under Rule
2 23(a)(4). Such conflicts “must be actual, not hypothetical,” *Meijer, Inc. v. Abbott Labs.*, No. 07-
3 5985 CW, 2008 U.S. Dist. LEXIS 78219, at *15 (N.D. Cal. Aug. 27, 2008) (“*Meijer I*”). The
4 conflict “must be fundamental” and “must go to the heart of the litigation,” *Gunnells v.*
5 *Healthplan Servs., Inc.*, 348 F.3d 417, 430-31 (4th Cir. 2003) (quoting 6 Alba Conte & Herbert B.
6 Newberg, *NEWBERG ON CLASS ACTIONS* § 18:14 (4th ed.2002)). Where class members suffered
7 the same type of injury (over or under payment) and all stand to benefit from recovery of
8 damages, the class members’ interests are sufficiently aligned to satisfy Rule 23(a)(4). *See*
9 *Braintree Labs.*, 2011 U.S. Dist. LEXIS 121499, at *4-5; *Meijer I*, 251 F.R.D. 434-35; *Meijer II*,
10 2008 U.S. Dist. LEXIS 78219, at *15.²⁰

11 Third, speculation that the agreements may have benefited some hypothetical class
12 members, even if true, provides no basis for striking Dr. Leamer’s opinion. To succeed in
13 excluding Dr. Leamer’s testimony at the class certification stage, Defendants must go beyond “an
14 unsubstantiated assertion of error,” *Hemmings v. Tidyman’s Inc.*, 285 F.3d 1174, 1188 (9th Cir.
15 2002) (citation omitted), by showing how the additional facts change the scope of the analysis.
16 Defendants never even try to do this, perhaps because Defendants themselves cannot identify or
17 quantify these purported hypothetical benefits.

18 **IV. DR. LEAMER’S CONDUCT REGRESSION IS WORKABLE CLASS-WIDE**
19 **EVIDENCE OF WIDESPREAD IMPACT AND DAMAGES**

20 Dr. Leamer’s “conduct regression” is a statistical model designed to assess whether, and
21 to what extent, Defendants’ agreements suppressed compensation at each Defendant company.
22 Leamer ¶¶ 135-148 & Figs. 19-24. Multivariate regression is a standard approach to measuring
23 the effects of unlawful conduct in antitrust and wage suppression cases. This case is obviously
24 both. *REFERENCE MANUAL ON SCIENTIFIC EVIDENCE*, p. 305; Finkelstein & Levin, *STATISTICS*
25 *FOR LAWYERS* (2d ed. 2001), pp. 350-51. The Supreme Court has explained that most criticisms

26 ²⁰ Defendants’ reliance on *Brown v. Am. Airlines, Inc.*, No. 10-8431, --- F.R.D. ---, 2011 WL
27 9131817 (C.D. Cal. Aug. 29, 2011), *Opp.* at 22, is misplaced because in that case, the plaintiffs
28 sought to end an *existing* policy, and the defendant submitted affidavits from absent class
members stating that the class members would be adversely affected by the end of the challenged
policy. *Id.* at *10.

1 of a statistical regression, such as the purported omission of variables, go to its weight, not its
2 admissibility. *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 256 F.R.D. 82,
3 96 (D. Conn. 2009) (“As the Supreme Court noted in *Bazemore*, the failure to include certain
4 variables in a multiple regression analysis ‘will affect the analysis’ *probableness*, not its
5 admissibility.”) (quoting *Bazemore v. Friday*, 478 U.S. 385, 400 (1986)).²¹ In an antitrust case,
6 this goes hand in hand with the rule that, to prevail on class certification, antitrust “[p]laintiffs
7 need only advance a plausible methodology to demonstrate that antitrust injury can be proven on
8 a class-wide basis.” *In re TFT-LCDs*, 2012 U.S. Dist. LEXIS 9449 at *44; *accord In re Titanium*
9 *Dioxide*, 284 F.R.D. at *32. [REDACTED]

10 [REDACTED] Dr. Leamer finds that the
11 conduct regression, together with other evidence (economic theory and literature, documentary
12 evidence, testimony), is class-wide proof capable of showing the agreements suppressed
13 compensation generally. Leamer ¶¶ 11(b), 135-148 & Figs. 19-24; Leamer Reply ¶¶ 41-72.

14 The conduct regression provides a workable method of estimating damages. Once
15 Defendants’ antitrust violations, and the fact of Plaintiffs’ consequent damage, have been
16 established, courts do not require unattainable precision in Plaintiffs’ proof of the quantum of
17 damages in recognition that “[t]he vagaries of the marketplace usually deny us sure knowledge of
18 what plaintiff’s situation would have been in the absence of the defendant’s antitrust violation.”
19 *J. Truett Payne*, 451 U.S. at 566. Indeed, “[t]he antitrust cases are legion which reiterate the
20 proposition that, if the fact of damages is proven, the actual computation of damages may suffer
21 from minor imperfections.” *South-East Coal Co. v. Consolidation Coal Co.*, 434 F.2d 767, 794
22 (6th Cir. 1970) (citing, *inter alia*, *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282
23 U.S. 555 (1931)).

24 Dr. Leamer’s regressions do not—and need not—perform individualized damages
25 calculations. Whether at class certification or trial, it is sufficient that Plaintiffs are able to proffer

26 ²¹ “While the omission of variables from a regression analysis may render the analysis less
27 probative than it otherwise might be, it can hardly be said, absent some other infirmity, that an
28 analysis which accounts for the major factors must be considered unacceptable . . .” *Bazemore*,
478 U.S. at 400 (internal quotation marks and citation omitted).

1 a methodology for proving, with reasonable accuracy, aggregate damages to the class as a whole.
2 *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 297, 324 (E.D. Mich. 2001) (“[D]espite
3 Defendants’ claims to the contrary, the use of an aggregate approach to measure class-wide
4 damage is appropriate. As observed by a leading commentator on class actions: ‘aggregate
5 computation of class monetary relief is lawful and proper. Challenges that such aggregate proof
6 affects substantive law and otherwise violates the defendant’s due process or jury trial rights to
7 contest each member’s claim individually, will not withstand analysis.’”) (quoting 2 NEWBERG ON
8 CLASS ACTIONS § 10.05 (3d ed. 1992). “[T]he use of aggregate damages in antitrust cases has
9 been approved numerous times.” *In re TFT-LCDs*, 2012 U.S. Dist. LEXIS 9449 at *48-49
10 (collecting cases and rejecting argument that “aggregate-damages approach to . . . is a ‘fluid
11 recovery’ prohibited by the Ninth Circuit”).

12 Defendants cite *In re Hotel Telephone Charges*, 500 F.2d 86, 90 (9th Cir. 1974), for the
13 broad assertion that calculating aggregate damages violates the Rules Enabling Act. But that case
14 addressed the impropriety of aggregating damages to circumvent proof of the class members’
15 underlying claims to ease case management concerns, *see id.* (“allowing gross damages by
16 treating *unsubstantiated claims of class members collectively* significantly alters substantive
17 rights”) (emphasis added)—an argument Defendants have not, and cannot credibly, mount here.
18 In reality, “[t]he use of aggregate damages calculations is well established in federal court and
19 implied by the very existence of the class action mechanism itself.” *In re Pharmaceutical Indus.*
20 *Average Wholesale Price Litig.*, 582 F.3d 156, 157 (1st Cir. 2009) (affirming class action
21 judgment, including aggregate damages awards) (citing 3 Herbert B. Newberg & Alba Conte,
22 NEWBERG ON CLASS ACTIONS § 10.5 (4th ed. 2002) at 483-86). It is also well-established, and
23 undisputed, that aggregate damages and fluid recovery are available on Plaintiffs’ state law
24 antitrust claims under the Cartwright Act. *State of California v. Levi Strauss & Co.*, 41 Cal. 3d
25 460, 472 (1986); *Bruno v. Super. Ct.*, 127 Cal. App. 3d 120, 128-29 & n.4, 135 (1981).

26 Defendants dispute certain modeling choices made by Dr. Leamer, criticisms that go to
27 the weight of his opinions, not their admissibility. Rather than “disputing the use of the
28 methodology itself,” *In re EPDM*, 256 F.R.D. at 96, [REDACTED]

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[REDACTED]

[REDACTED] Those are merits arguments to be considered by the jury at trial, and are not legitimate bases for denying class certification or excluding Dr. Leamer’s regression analysis altogether. In fact, Dr. Leamer’s methodology is sound evidence capable of showing generalized compensation suppression, and it is Dr. Murphy’s “tests” that are unsound.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Leamer ¶¶ 145 & Figs. 20-21.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

²² [REDACTED]

[REDACTED]

Footnote continued on next page

1 Thus, what Defendants are really challenging is how *much* the model should be
2 dissagregated. [REDACTED]

3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED] [REDACTED]
12 [REDACTED]
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17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]

22 [REDACTED]
23 [REDACTED] Finally,
24 Dr. Leamer includes certain fixed-effect variables for each Defendant that allows the model to
25 accommodate various differences between the firms themselves during the Class Period. *Id.*

26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 degree of variability that should be allowed in the model and the number of variables that should
2 be included, not an attack on the methodology itself.

3 Defendants are also misrepresenting the nature of statistical regression. [REDACTED]

4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED] Courts have
18 recognized that aggregate data is appropriate where disaggregation masks statistical significance
19 and where the “question at issue” (i.e., the claims of the case) warrants the use of aggregated data.
20 *See, e.g., Ellis*, 2012 U.S. Dist. LEXIS 137418 at *100 (rejecting defendant’s disaggregation of
21 employment data by region and finding that use of nationwide data was warranted because “the
22 larger aggregate numbers allow for a robust analysis and yield more reliable and more meaningful
23 statistical results,” and the company practices at issue were nationwide); *Paige v. California*, 291
24 F.3d 1141, 1148 (9th Cir. Cal. 2002) (“[I]t is a generally accepted principle that aggregated
25 statistical data may be used where it is more probative than subdivided data.”) (citations omitted);
26 *Eldredge v. Carpenters 46 N. Cal. Counties Joint Apprenticeship and Training Comm.*, 833 F.2d
27 1334, 1339-40 n.8 (9th Cir. 1987) (“[T]he plaintiff should not be required to disaggregate the data
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1 into subgroups which are smaller than the groups which may be presumed to have been similarly
2 situated and affected by common policies.”) (citation omitted).

3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
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13 [REDACTED]
14 [REDACTED]
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16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]

[illegible]

1 do not depend on them.”). Thus, this is yet another red herring. [REDACTED]

2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED] This confirms that statistical regression works as a
8 *methodology* for demonstrating class-wide harm.

9 **V. DEFENDANTS’ PURPORTED LEGAL AUTHORITY IS INAPPOSITE**

10 First, Defendants rely on *Wal-Mart v. Dukes*, a gender discrimination case in which
11 plaintiffs claimed local managers exercised unbridled discretion over pay and promotions in a
12 manner that disproportionately favored men. The Supreme Court reversed certification because
13 there was not a “single common question” at issue: there were no relevant corporate policies aside
14 from one that vested discretion in local supervisors. 131 S. Ct. at 2556 (internal quotation and edit
15 omitted). Instead, a generalized culture of bias was itself the alleged violation. *Dukes* is wholly
16 distinguishable from this antitrust case where plaintiffs must prove common, collusive conduct in
17 order to prevail at all. The basis of Plaintiffs’ claim—the predominant issue of the case—is the
18 antitrust conspiracy among Defendants’ senior executives, including their chief executives, to
19 adopt and enforce nearly identical firm-wide policies that were designed to eliminate competition
20 among them for their employees. As intended, these systematic, common policies resulted in
21 lower compensation budgets and harm to the Class as a whole. Defendants’ coordinated
22 misconduct provides the class-wide “glue” that was absent in *Dukes*. *Id.* at 2552.

23 Defendants then rely upon several District Court decisions, to no avail. In *Weisfeld v. Sun*
24 *Chemical Corp.*, 210 F.R.D. 136 (D.N.J. 2002), the court denied plaintiff’s motion for class
25 certification because plaintiff had not sufficiently demonstrated common proof of antitrust
26 impact. *Id.* at 145. But unlike here, the plaintiff offered no evidence of class-wide impact other
27 than “the naked conclusions of his expert.” *Id.* at 143. Moreover, the plaintiff’s expert
28 declaration was deficient on its face: “This Court is not convinced that Plaintiff’s expert has even

1 claimed, much less shown, that he will be able to prove impact on a classwide basis.” *Id.* at 144.
2 Dr. Leamer’s report, by contrast, contains multiple statistical analyses, further supported by
3 documentary evidence and economic theory, all of which demonstrate the predominance of
4 common issues. *Fleischman v. Albany Medical Center*, 06-765, 2008 U.S. Dist. LEXIS 57188
5 (N.D.N.Y. July 28, 2008), involved only information exchange, not direct agreements as present
6 here, and the plaintiffs offered “no empirical proof” that the conspiracy had a common impact.
7 *Id.* at *16. Plaintiffs’ “empirical proof” here includes statistical analysis and confirming
8 documentary evidence. In *Reed v. Advocate Health Care*, 268 F.R.D. 573 (N.D. Ill. 2009),
9 plaintiffs’ expert could only explain “between 48% and 63%” of the variance in wages across
10 class members. *Id.* at 592. This is in stark contrast to the case at hand, [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED] Leamer ¶ 129; see also Parts III.A and III.B, *supra*. *In re Comp. of*
16 *Managerial, Profl, & Tech. Emples. Antitrust Litig.*, MDL No. 1471, 2003 U.S. Dist. LEXIS
17 22836 (D.N.J. May 27, 2003) is also inapposite. There, plaintiffs proceeded under a rule of
18 reason theory of liability, not, as here, under a *per se* theory. Thus, the Court focused on market
19 definition, an issue that is not in dispute in a *per se* case. *Id.* at *10-11.

20 Defendants also rely on *Johnson v. Arizona Healthcare Association*, No. 07-1292, 2009
21 U.S. Dist. LEXIS 122807 (D. Ariz. July 14, 2009). However, in that case the court certified a
22 class of temporary per diem nurses and denied certification of temporary traveling nurses.
23 Whereas both proposed classes consisted of temporary workers who negotiated their
24 compensation across a wide variety of employers, per diem nurses were “paid in a much more
25 predictable, consistent manner than travel nurses, and there is less variation among the group of
26 per diem nurses than among the group of travel nurses.” *Id.* at *33 -34. Here, temporary workers
27 are not part of the Class at all, traveling or otherwise. All Class members in this case were
28

1 regular, salaried employees and paid in a “predictable, consistent manner” according to [REDACTED]

2 [REDACTED]

3 **VI. EVIDENTIARY OBJECTIONS**

4 Dr. Murphy’s report should be excluded under *Daubert* and Rule 702 for the reasons

5 stated above, including his unscientific reliance on Defendant interviews and declarations. *See*

6 Part II.B, *supra*. Dr. Murphy’s report should also be excluded because he relies on interviews

7 with Defendants’ employees that have never been adequately disclosed in violation of Rule

8 26(a)(2)(B)(ii). [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 **A. Dr. Murphy’s Opinions Should be Excluded Because Defendants Have Failed**

12 **to Disclose the Facts On Which They Were Based**

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 Litigants are required to disclose any “facts or data” relied on by a testifying expert, and

25 the sanction for violating this rule can include barring the expert from testifying. Fed. R. Civ. P.

26 26(a)(2)(B)(ii), 37(c)(1). To comply with the rules, Dr. Murphy should have included the full

27 substance of his interviews in his report; alternatively, Defendants should have produced

28 recordings of the interviews, declarations disclosing the entire contents of the interviews, or

1 contemporaneous written summaries or notes. Defendants cannot, however, proffer Dr.
2 Murphy's expert testimony while concealing material he relied on and that would be helpful to
3 Plaintiffs in understanding or challenging Dr. Murphy's opinions. *See Mems v. City of St. Paul*,
4 327 F.3d 771, 779-80 (8th Cir. 2003) (affirming exclusion of expert testimony where party
5 withheld interview notes that included material not in expert's reports).²⁴ Defendants erroneously
6 claim that "Plaintiffs had a full opportunity to question [Dr. Murphy] about his opinions, the
7 bases for those opinions, and anything he relied on." Docket No. 245 at p.17. In fact, Dr. Murphy
8 relied on the interviews in general to explain discrepancies in his opinion but could not remember
9 any of the details. Harvey Decl., Ex. 13 (Murphy Dep. at 99:24-100:3) ("[REDACTED]
10 [REDACTED]
11 [REDACTED].").²⁵

12 **B. Defendants Violated Discovery Obligations With Respect [REDACTED]**

13 Defendants submitted [REDACTED].

14 For five of them, Defendants either refused to produce documents from the witnesses' files or did
15 not disclose the witnesses' identities (or did so in an untimely fashion), impairing Plaintiffs'
16 ability to explore whether evidence exists that may contradict the witnesses' declarations. *See*
17 *Joint Case Mgt. Conf. Stmt. (Dkt. No. 245) at 11-16*. Under Fed. R. Civ. Pro. 37(c)(1), exclusion
18 of evidence is the "self-executing" and "automatic" sanction for violations of Rule 26(a) and (e).
19 *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001). Rule 37(c)(1)
20 provides that "[i]f a party fails to provide information or identify a witness as required by Rule
21 26(a) or 26(e), the party is not allowed to use that information or witness to supply evidence on a
22

23 ²⁴ Exclusion is the appropriate remedy where Defendants have refused to produce existing
24 summaries that could have cured the failure to include these facts in Dr. Murphy's report, or his
25 inability to testify about them. *Compare Bd. of Trustees v. JPMorgan Chase Bank, N.A.*, No. 09-
26 686, 2011 U.S. Dist. LEXIS 144382, *42 (S.D.N.Y. 2011) (denying remedy of exclusion where
27 full substance of interviews is incorporated into the body of expert's report and opponent has
28 deposed the interview subjects).

²⁵ Defendants argue that Plaintiffs could have deposed the declarants. [REDACTED]
[REDACTED]
[REDACTED]

1 motion . . . unless the failure was substantially justified or is harmless.” *See Medina v. Multaler*,
2 547 F. Supp. 2d 1099, 1106 fn.8 (C.D. Cal. 2007) (granting motion to strike employee declaration
3 where employee was not listed on Rule 26 disclosures and “failure to disclose [employee] as a
4 likely witness before defendants’ summary judgment motion was filed prejudiced defendants by
5 depriving them of an opportunity to depose him.”). [REDACTED]

6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]

21 Defendants’ failure to comply with Rule 26 as to these witnesses provides an additional
22 reason to exclude the report of Dr. Murphy and deny their motion.

23 **CONCLUSION**

24 For the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs’
25 motion for class certification and deny Defendants’ motion to strike.

26 _____
27 ²⁶ [REDACTED]
28 [REDACTED]

1 Dated: December 10, 2012

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